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Supreme Court, U.S.
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NO. 03-1498

IN THE SUPREME COURT OF THE UNITED STATES

ALICE PAYNE,

Petitioner,

v.

JOHNNY LEE RILEY JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Riley concedes that the Ninth Circuit applied a "less deference" standard in reviewing defense counsel's decision not to personally interview and call a witness in Riley's state court criminal trial. Riley incorrectly argues this "less deference" standard is consistent with *Strickland v. Washington*, 466 U.S. 668 (1984) because the amount of deference accorded to counsel's decision should be based on the amount of investigation personally conducted by counsel. Because the Ninth Circuit failed to provide proper deference to both counsel's decision and the state court adjudication of Riley's claim of ineffective assistance of counsel, the Court should grant the petition for a writ of certiorari and summarily reverse the decision of the Ninth Circuit Court of Appeals.

ARGUMENT

1. The "Less Deference" Rule Is Unrelated To Whether Counsel Conducted A Thorough Investigation.

In the petition we explained that the Ninth Circuit's "less deference" rule conflicts with *Strickland v. Washington*, 466 U.S. 688 (1984) and decisions from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuit Courts of Appeal. Pet. 9-11. In *Strickland* and the other decisions, the claim was that counsel was ineffective because he or she failed to interview and call certain witnesses. All of the cases applied a heavy measure of deference to counsel's performance. No decision suggested that counsel's performance

was entitled to less deference because he or she did not personally interview a potential witness.

Riley claims that the decision below is consistent with *Strickland* because "strategic decisions will be given greater deference when made after a thorough investigation." Br. Opp. 8. But the Ninth Circuit's less deference rule has nothing to do with whether there was a thorough investigation. In this case counsel knew about Pettis and why he might be a helpful witness – Riley told him. Br. Opp. 9.[1] If counsel had taken an additional step and sent a well trained investigator to speak with Pettis, the Ninth Circuit would still apply its less deference rule because counsel did not personally interview Pettis before deciding not to call him. Thus, even in a case where counsel conducts a meticulous investigation – using a dozen well trained investigators – the Ninth Circuit would apply less deference to counsel's decision unless the lawyer personally spoke to every witness he or she decided not to call. Indeed, under the less deference rule, the more thorough the investigation – the less deference will be accorded to counsel's decision not to call a particular witness. If counsel has a dozen investigators talking to hundreds of potential witnesses, it would be virtually impossible for counsel to speak with every witness he or she decided not to call.

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[1] Riley suggests that counsel in this case conducted no investigation. Br. Opp. 8. But this is plainly wrong. Riley concedes that he explained to his counsel "why Pettis would be a helpful witness". Br. Opp. 9. Riley also concedes that in *Strickland* the investigation was proper even though counsel "based his approach largely on the choices of and information provided by his client." Br. Opp. 7.

Riley also defends the Ninth Circuit's "less deference" standard by suggesting the application of the presumption of competence rests upon the extent of counsel's personal investigation. Br. Opp. 8 ("The 'less deference' statement was no different than saying that the court would have given counsel *more* deference had he interviewed Pettis and then decided he would not make a good witness."). Riley cites no authority to support his claim that the deference applied to counsel's performance is based on some sliding scale depending on the number of personal interviews counsel conducts.

Strickland and its progeny do not support Riley's position. On the contrary, the Court has repeatedly reminded the federal courts that any review of a claim of ineffective assistance of counsel must be highly deferential. *Strickland*, 466 U.S. at 689; *Yarborough v. Gentry*, 124 S. Ct. 1, 4-7 (2003) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). The review must be "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough*, 124 S. Ct. at 4.

The highly deferential review required under *Strickland* is necessary to prevent second guessing by the federal courts. As the Court cautioned in *Strickland*, "a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Bell v. Cone*, 535 U.S. 685, 702 (2002). The difficulties inherent in evaluating counsel's representation require the strong presumption of competence. *Strickland*, 466 U.S. at 689.

In contrast to the deferential review required by *Strickland*, the purpose of the less deference rule is to permit the Ninth Circuit to second guess counsel's performance. Pet. App. 13a ("a lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor – *factors we are not in a position to second-guess*".) (emphasis added).

Riley argues that there is no conflict in the circuits because the petition "points to no court of appeals decision holding that it is improper to consider whether or not defense counsel interviewed a witness before declining to present him." Br. Opp. 8. Riley's claim misses the point. All of the other circuits apply a heavy measure of deference to counsel's decision not to interview and call a particular witness. Pet. 10-11. The Ninth Circuit does not. It applies less deference unless counsel personally interviews the witness he or she decided not to call to the stand.

2. The Ninth Circuit Improperly Shifted The Burden To Petitioner To Prove Counsel Performed Competently.

The Ninth Circuit compounded its erroneous evaluation of counsel's performance, as well as its review of the state court adjudication of Riley's claim, by placing the burden of proving competence upon the State, rather than placing the burden of proving incompetence on Riley. The Ninth Circuit stated, "the record does not disclose any reason for the failure of counsel to contact Pettis." Pet. App. 13a. "The government has provided no testimony of counsel as to why he did not contact Pettis. Pet. App. 14a. Refusing to presume competence, the

Ninth Circuit concluded, based upon the silent record,[2] that counsel did not make a reasonable professional judgment not to interview and call Pettis. Pet. App. 14a. The Ninth Circuit then found the state court adjudication unreasonable because the court "speculated that counsel might have had some 'tactical reason not to pursue Pettis as a witness'". Pet. App. 24a. The Ninth Circuit held "counsel cannot be presumed to have made an informed tactical decision." Pet. App. 25a.

Riley admits that *Strickland* "requires that Riley establish that [counsel's] performance fell below an objective standard of reasonableness." Br. Opp. 9. However, the remainder of Riley's discussion of this point illustrates how the burden of proof was shifted. According to Riley the Ninth Circuit concluded that "counsel cannot be *presumed* to have made an informed tactical decision on the undisputed facts of this case." Br. Opp. 9 (emphasis added). Of course the presumption applied by the Ninth Circuit was not the heavy measure of deference required by *Strickland* but the less deference standard. Riley goes on to explain that the state failed to put on evidence or request discovery. Br. Opp. 9. In other words, the less deference standard shifted the burden of proof from Riley to the government.

This shifting of the burden of proof is inconsistent with the approach taken by other

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[2] The presumption of competence has particular force in cases, such as Riley's, where the ineffective assistance claim is based upon a record "in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a strategic motive." *Yarborough*, 124 S. Ct. at 5-6 (quoting *Massaro v. United States*, 538 U.S. 500 (2003)).

circuits. For example, in *Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000), the court explained that counsel's competence is presumed, and the habeas petitioner must rebut the presumption by proving counsel's representation fell below reasonable professional norms. *Id.* "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption." *Id.* "Therefore, 'where the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.'" *Id.* (quoting *Waters v. Thomas*, 46 F.3d 1506, 1516 (11th Cir. 1995) (*en banc*)). The presumption of competence, like the "presumption of innocence" in a criminal trial, continues throughout the habeas proceedings. *Chandler*, 218 F.3d at 1314 n.15. The habeas petitioner continually bears the burden of persuasion on the issue of competence. *Id.* "Never does the government acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner." *Id.*

Riley bears the burden of proof. Riley must overcome the strong presumption that counsel chose not to interview and call Pettis "for tactical reasons rather than through sheer neglect." *Yarborough*, 124 S. Ct. at 5.

In the petition, we explained that shifting the burden of proof is significant because (1) it allows the reviewing court to second guess trial counsel's performance and is inconsistent with the Antiterrorism and Effective Death Penalty Act of 1996; (2) the government is in a poor position to explain trial counsel's strategy; and (3) claims of ineffective assistance of counsel based on trial

counsel's failure to interview and call witnesses are common and easily made. Pet. 13-16. Riley does not respond to these important reasons for granting the petition.

3. Summary Reversal Is Appropriate In This Case.

The Ninth Circuit's less deference rule is an aberration. Under this rule, counsel's performance is not entitled to a heavy measure of deference unless the lawyer personally interviews every witness he or she decides not to call to the witness stand. The less deference rule is inconsistent with *Strickland* and the decisions of the other courts of appeal. In light of this substantial deviation from this Court's precedent – that is well understood in other circuits – the Court should grant the petition and summarily reverse the decision below.

The Court has summarily reminded the federal courts of the level of deference owed to state court adjudication of ineffective assistance of counsel claims under 28 U.S.C. § 2254(d). *Yarborough v. Gentry*, 124 S. Ct. 1 (2003) (*per curiam*); *Holland v. Jackson*, 124 S. Ct. 2736, 2738-39 (2004) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). "If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Yarborough*, 124 S. Ct. at 4. "Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable." *Id.*

As the Court "explained in *Visciotti*, § 2254(d) requires that 'state-court decisions be given the benefit of the doubt.'" *Holland*, 124 S. Ct at 2739. "'[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law.'" *Id.* (quoting *Visciotti*, 537 U.S. at 24).

In Riley's case, the state courts reasonably concluded that counsel provided reasonably competent representation. The conclusion to the contrary "– not only that his performance was deficient, but that any disagreement with that conclusion would be objectively unreasonable – gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials." *Yarborough*, 124 S. Ct. at 7. Summary reversal of the Ninth Circuit's opinion is appropriate.

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be summarily reversed.

RESPECTFULLY SUBMITTED

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